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No. 99-1257

In The

Supreme Court of the United States

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, et al.,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Respondents.

On A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF AMERICAN CROP PROTECTION ASSOCIATION, AMERICAN WOOD PRESERVERS INSTITUTE, CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, THE FERTILIZER INSTITUTE, INTERNATIONAL SANITARY SUPPLY ASSOCIATION, NATIONAL PEST MANAGEMENT ASSOCIATION, PROFESSIONAL LAWN CARE ASSOCIATION OF AMERICA, AND RISE (RESPONSIBLE INDUSTRY FOR A SOUND ENVIRONMENT) IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The American Crop Protection Association (ACPA) is a not-for-profit trade organization that represents the major manufacturers, formulators, and distributors of crop protection, pest control, and biotechnology products. ACPA member companies produce, sell, and distribute virtually all the scientific technology products used in crop production by American farmers.

The American Wood Preservers Institute (AWPI) is the national industry trade association representing the pressure-treated wood industry throughout the United States. Member companies are wood pressure treaters, preservative manufacturers, and supporting companies working to conserve forest resources, preserve the environment, and extend the life of wood products through the manufacture of pressure-treated wood.

The Chemical Specialties Manufacturers Association (CSMA) is a voluntary, nonprofit trade association composed of several hundred companies engaged in the manufacture, formulation, distribution and sale of non-agricultural pesticides, antimicrobials, detergents and cleaning compounds, industrial and automotive specialty chemicals and polishes, and floor maintenance products for household, institutional, and industrial uses.

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1 All parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amici curiae* hereby affirm that no counsel for any party in this case authored any part of this brief, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The Fertilizer Institute (TFI) is a voluntary, nonprofit trade association of the fertilizer industry. TFI's nearly 250 member companies manufacture over 90 percent of the domestically produced fertilizer. TFI's membership includes producers, manufacturers, distributors, transporters, and retail farm suppliers of fertilizers and fertilizer materials.

The International Sanitary Supply Association (ISSA) is a nonprofit trade association comprised of over 4,600 manufacturers and distributors of institutional and industrial cleaning and maintenance products. As such, the membership plays a key role in maintaining the sanitary and healthful conditions of institutional/industrial facilities such as day care centers, schools, hospitals, nursing homes, hotels, restaurants, and food processing plants.

The National Pest Management Association (NPMA) is a not-for-profit trade association that represents approximately 5,000 firms that are engaged in the business of providing structural pest management services to residential, commercial, and industrial customers, as well as companies that produce or distribute the products used by such firms.

The Professional Lawn Care Association of America (PLCAA) is an international association that promotes education, balanced legislation, and public awareness of the environmental and aesthetic benefits of turf and ornamentals. Its mission is "Growing Leaders" in the Green Industry. PLCAA represents more than 1,200 lawn and landscape companies, industry suppliers, government agencies, grounds managers, educators, and students in the United States, Canada, and other countries.

RISE (Responsible Industry for a Sound Environment) is the national association representing the

manufacturers, formulators, distributors, and other industry leaders involved with pesticide products used in turf, ornamental, pest control, aquatic and terrestrial vegetation management, and other nonfood/fiber applications.

Amici are trade associations whose members are directly affected by EPA's health, safety, and environmental standards, including those promulgated pursuant to § 109 of the Clean Air Act (CAA). Given that the Clean Air Act provides no certain course for determining how clean the air should be, *amici* focus on the constitutional nondelegation issue presented in this case. In particular, *amici* address the question of whether Congress has legislated with sufficient clarity and precision so that the Executive Branch can make decisions on such matters in order to fulfill a statutorily enunciated principle governing life and health.

SUMMARY OF ARGUMENT

A delegation to an Executive Branch agency to establish standards for particulate matter in our air that recites no more than "requisite to protect the public health" and "public welfare" is plainly unconstitutional. If that fact were not readily apparent, it certainly becomes so when it is seen that these meager terms, undefined and unexplained, enable an Executive Branch agency to write regulations over a range of possibilities that include deindustrialization of the nation on one extreme, and possibly tens of thousands of deaths and illnesses on the other.

This Court's jurisprudence provides little usable guidance in its precedent nondelegation cases to address the instant case. From this sparse case law we have no more than a series of terms including "intelligible principles," "standards," and "boundaries" for use as models to determine whether a provision of a statute inadequately communicates

the intentions of the legislative branch. These terms appear especially inadequate where the statutory provision is capable of producing profound changes in virtually all of our society.

It has become very readily apparent that Congress increasingly is using the legislative delegation device to avoid making hard choices and to pass to the two coordinate branches, issues which are too hot to handle. In no instance is this aspect of the problem more apparent than in the present case. CAA § 109 has been in effect for thirty years, the problems with its interpretation have been notorious for all that time, and no further explication has been received from the Legislative Branch; nor have the problems with its interpretation abated in all of that time notwithstanding many efforts at addressing these problems by the courts.

One overriding problem produced by this intended silence is the question of whether the economics of compliance shall be considered by the Environmental Protection Agency (EPA) in developing regulations. Twenty years ago, the D.C. Circuit prohibited such consideration. Yet, not only has it become readily apparent that rulemaking without such consideration is impossible, but the silence of Congress combined with this ruling has sent economic considerations underground. It is fair to note that the refusal of Congress to address the imperative need to consider cost benefit and economics more generally where health and welfare are unquestionably traded off, has become a generic nondelegation problem affecting a wide range of statutes, many of which have, as a result, wound up before the courts, including this Court.

It is not imperative of our larger and more complex society that Congress must yield its legislative responsibilities to the other two coordinate branches. The movement in that direction ultimately undermines a core

requirement of separation of powers. This Court has long held that Congress can call upon many assets, including those appearing for purposes of petitioning and, of course, those available to the Executive Branch, in this case, the EPA. Thus, the very parties before this Court (including the many *amici*), and the very arguments being made here, to the court below and to EPA itself, should have been made to Congress, which then should have provided the Executive Branch with meaningful guidance for these critical decisions.

EPA should not be permitted to substitute its supposition for the enunciated intent of Congress. The courts should not be imposed upon to complete the making of legislation requiring choices seen as politically too hard for the nation's elected representatives. This case contains sufficiently far reaching and profound requirements for the Court to enunciate the violation of the nondelegation doctrine. The decision should be reversed, the provision declared unconstitutional, and Congress given the opportunity, after thirty years, to enunciate its objectives in terms sufficiently precise to enable regulation and not lawmaking by EPA.

ARGUMENT

We limit the address of this brief to the issue of nondelegation, and we limit our factual setting to particulate matter (PM). The first limitation accords with the determination by the Court on the planned "two rounds" of briefing. The second limitation is self-imposed. While these *amici* take some issue with the posture of the ozone standards and the D.C. Circuit's decisions on that subject, it is the view of these *amici* that the dominant issue, subsuming all others in the case, is nondelegation.

When Congress passed the CAA in 1970, it included as § 109(b)(1)-(2) a provision requiring EPA to create primary air standards, including those for PM and ozone "requisite to protect the public health" with "an adequate margin of safety," and secondary air standards "requisite to protect the public welfare." 42 U.S.C. § 7409(b)(1)-(2). While the subject is contested, it is quite clear that Congress - literally - did nothing to define what it meant by these terms. As a result, over the succeeding thirty years, EPA, industry, and public interest groups have struggled to understand just what these terms mean. This was no easy task because, unlike parallel pollution abatement and safety requirements imposed by legislation of the same vintage, these requirements transcended anything that was site or industry specific and portended wholesale changes to be imposed in every corner of American life. The reach of "public health" and "public welfare" in this case is what casts the case as a nondelegation issue.

EPA first issued rules under these provisions in 1971. They were revised for ozone in 1979 and for PM in 1987. This case is the product of further revisions to both, originally begun in the early 1990s. It is uncontested that there has been a huge leap forward over the thirty years - and at an accelerating rate - in our ability to know what the pollutants are, what are their sources, the extent of their presence in our ambient air, and the risks to human well-being. Similarly we have experienced considerable advances in our ability to curtail these risks from many, if not all, of their sources. Not only does the CAA require renewed inquiries and rulemaking, but it is certainly provident for EPA to conduct the exercise that gives rise to this case.

In July 1997, EPA issued its final rules revising the primary and secondary National Ambient Air Quality Standards (NAAQS) for PM, and the instant case was

initiated by several petitioners. Certain of the petitioners seemed to take the position that the interpretation placed on § 109 by EPA had resulted in a violation of the nondelegation doctrine, and they sought to have the D.C. Circuit vacate the PM levels and remand them to EPA. *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) ("*American Trucking*").

Citing the test enunciated by Chief Justice Taft in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), the court of appeals agreed with these petitioners:

> Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle.

American Trucking, 175 F.3d at 1034. One may well ask how the court reached a "reasonableness" determination in the absence of "intelligible principles."

This conclusion by the court came after it had given EPA the opportunity in briefing and in argument to enunciate such a principle. EPA then petitioned for rehearing and for rehearing en banc. The former was granted in part and the latter was denied. *American Trucking Ass'ns, Inc. v. EPA*, 195 F.3d 4, 6 (D.C. Cir. 1999) ("*American Trucking Rehearing*"). In granting, in part, the petition for rehearing, the Circuit refused to modify its holding that the interpretation by EPA had created a potential violation of the

nondelegation doctrine, noting that, finally, EPA counsel had asserted what they believed to be an intelligible principle, but that whether it was indeed so would depend on its application in further determinations of NAAQS. *Id.* at 6-7. Thus, after multiple rounds of briefing and argument, it appears that the status of the case, short of this Court's determination, is that the Circuit has found there to be no articulation of an "intelligible principle" on which to base the standards issued, but only such a principle asserted by EPA counsel in its briefing and argument; no coupling of such a principle to the standards issued; and, as the Circuit noted, no such principle "apparent from the statute" itself. *Id.* at 6 (citing *American Trucking,* 175 F.3d at 1034).

The Round One briefing when considered with the Circuit decision reveals the dimension of this case. First, although given little attention other then by the Cross-Petitioners, the Circuit did indeed rely on its earlier decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) ("*Lead Industries*") to predicate its decision here on the notion that § 109 could not consider cost factors because none were implicated in the language of the provision.[2] The implications of this approach dictate that only health may be considered in setting NAAQS. Supporting this approach, one of the briefing parties noted that

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2 *American Trucking*, 175 F.3d at 1038 ("Cost-benefit analysis ... is not available under decisions of this court. Our cases read § 109(b)(1) as barring EPA from considering any other factor other than 'health effects relating to pollutants in the air.' " (citations omitted)).

> EPA has estimated that 3,000-15,000 deaths, 6,000-10,000 hospital admissions for respiratory and cardiopulmonary causes, tens of thousands of cases of respiratory illness, and millions of days of missed work and restricted activity will be prevented each year just by PARTIAL attainment of the new standards.[3]

Since PMs are thought to be "non-threshold pollutants" (*American Trucking*, 175 F.3d at 1034), it would appear that this camp could advocate that § 109(b)(1)-(2) compels protection of "public health" and "public welfare" by the curtailment of all or virtually all these deaths and illnesses. 42 U.S.C. § 7409(b)(1)-(2). This is an approach which has been characterized as calling for the "de-industrialization" of the United States. *American Trucking*, 175 F.3d at 1038 n.4. Arrayed against this approach is much of industry taking the position that *Lead Industries* is wrong and that if this Court will but overturn that decision, EPA would be free to consider the economic impact of more stringent regulation and consider too the cost benefit issues which they have raised. *See, e.g.,* Brief for Cross-Petitioners at 27, *et seq.*

There is little doubt, assuming as we do the validity of the premises of the competing parties, that this case literally concerns life and death issues: To what extent is EPA to determine standards on the basis of who shall live, who shall

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3 Brief of Respondent American Lung Association in Support of Petitioner at 2 (citing Regulatory Impact Analysis (RIA) 12-43, JA(PM) 3486).

die, who shall be well, and who shall suffer respiratory-related illnesses? The nondelegation issue presented by this case then is whether Congress has legislated with sufficient clarity and precision that the Executive Branch can make decisions on such matters to fulfill a statutorily enunciated, intelligible principle governing life and health. The answer is plainly in the negative.

The subsidiary issues concern just what to do about this problem. The Circuit had two answers: send the case back to the Executive Branch agency for an explication of the principles on which THEY relied, and treat the case as a *Chevron*[4] II problem to be solved as though the statute is merely ambiguous and can be rationalized with the assistance of the agency. *American Trucking*, 175 F.3d at 1033; *American Trucking Rehearing*, 195 F.3d at 8.

I. THIS COURT'S PRIOR NONDELEGATION PRECEDENTS DO NOT PROVIDE A REASONABLY CLEAR BASIS FOR DETERMINING WHEN CONGRESS HAS IMPROPERLY DELEGATED ITS LEGISLATIVE RESPONSIBILITIES

A. A Weak History For Three-Quarters Of A Century

4 *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue," the Court must determine [under step two of the *Chevron* test] whether the agency's interpretation "is based on a permissible construction of the statute.")

The jurisprudence of this Court on the subject of nondelegation recognizes that it is a subset of separation of powers,[5] and its decisions generally take on one of two characteristics. They either represent the allegedly improper delegation of a "function" which is reserved to a coordinate branch, or they represent delegations of lawmaking responsibilities in the guise of execution of the law; there is much overlap between the two. Function delegation issues such as those presented by *Morrison v. Olson*, 487 U.S. 654 (1988), *INS v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.* 458 U.S. 50 (1982), and *Buckley v. Valeo*, 424 U.S. 1 (1976), are not at issue here. They are presented with sufficient frequency so that a reasonable pattern can be ascertained.

This case presents issues of delegation of legislative responsibilities in the guise of execution, and such cases are relatively rare. In the Twentieth Century, there have been remarkably few such decisions and they have provided no particularly useful guiding principles. Oft quoted, but of dubious value, is the penultimate statement in *J.W. Hampton* that Congress must "lay down by legislative act an intelligible principle to which the person or body ... is directed to conform." 276 U.S. at 409. But the notion of an "intelligible principle" has little meaning at all and, if manifested solely in simple adjectives and adverbs, generally cannot guide a regulatory agency in generating a set of regulations as complex as those directed to our ambient air.

Which is not to say that the notion has failed to receive at least some elaboration. It is recognized, however,

5 *Field v. Clark*, 143 U.S. 649 (1892); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

that such elaboration has not built an effective set of standards governing the conduct of Congress in its lawmaking. *National Cable Television Ass'n, Inc. v. U. S.*, 415 U.S. 352, 352-353 (1974) (Marshall, J., concurring in No. 72-1162, & dissenting in No. 72-948). We had two such decisions of New Deal vintage. In the first, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935), the application of the NIRA was rejected because Congress had established "no criterion to govern the President's course...." Two years later, the Court again struck down the application of the NIRA in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Chief Justice Hughes writing in that case noted:

> We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly.... [T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicability, which will enable it to perform its function in *laying down policies* and *establishing standards*, while leaving to selected instrumentalities the making of *subordinate rules within prescribed limits* and the determination of facts to which the policy as declared by the legislature is to apply.[6]

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6 It would have been possible for the courts thereafter to employ these terms prescribed by the Chief Justice to delineate more precisely the "policies," "standards," and "prescribed limits"
(Footnote continued on next page)

Id. at 529-30 (emphasis added). Justice Cardozo, concurring, differentiated between "codes" the objectives of which are to eliminate abuses and those involving the "planning of improvements." *Id.* at 552. Delegation of the former, he noted "is borne of the necessities of the occasion." *Id.* As to the latter, however, he voiced a much more restrictive approach to what may be delegated, having noted that the use of such devices was on the increase (in 1935):

> In that view, the function of its adoption is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything Congress may do within the limits of the Commerce Clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer.

Id. These decisions were followed by a seemingly long hiatus during which they were cast into a limbo borne of the

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(Footnote continued from previous page)
which needed to be embodied in legislation, but there was no such elaboration until *Mistretta v. United States*, 488 U.S. 361 (1989), when this Court took up the term "boundaries." *Id.* at 373 (citations omitted).

crisis times of their writing. In this period, the complexities of governance grew exponentially as did the temptation of Congress to delegate its functions to the Executive Branch. The courts, however, were reticent about intervening in this process and therefore, we can "skip" to the 1980s with the brief stop at Justice Frankfurter's concurring observation in 1952 that:

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952).

The admonitions of Justices Cardozo and Frankfurter came, apparently, in a period during which war, followed by huge economic growth, followed by acts of environmental contrition (among others) had so overloaded the flow of legislation and growth of bureaucracies that when this Court finally "got back" to the subject, it would seem that retrieving control was either impossible or unwise. Then Professor Antonin Scalia, in 1979, commented on this problem in the context of the growing practice of "legislative veto" (some three years before this Court's decision in *Chadha*) noting the expanse of the delegations of legislative authority that had occurred over the preceding fifty years. Scalia, "The Legislative Veto: A False Remedy for System Overload," *REG.*, Nov.-Dec. 1979, 19 ("Scalia, Legislative Veto"). He commented that delegation devices, with the supposed restraints of later oversight by Congress were, in many instances, enabling the legislative branch to preserve "control

while relieving the people's representatives of the embarrassment of voting." *Id.* at 25.

B. A Tentative Effort Starting In 1980

Thus, the problem had transcended accretion or arrogation of power by the Legislative Branch and had entered the realm of cession by that branch either because it seemed not able to cope or because it had found a means to avoid hard decisions "too hot to handle." Scalia, Legislative Veto, at 24. It would lead Justice Rehnquist to comment in *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980) ("*Benzene*"):

> It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.

In 1980, and again in 1981, this Court confronted two cases arising out of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, the first, popularly known as "*Benzene,*" and the second, known as "*Cotton Dust,*" *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981). In those two decisions, we saw the product of fifty years of Executive Branch growth and the seeming uncertainty about how to treat the increasing expansion of legislative delegation practices using no more coherent "intelligible principles" then the insertion of vague, multi-meaning adjectives and adverbs.

In *Benzene*, the Court had to deal with two provisions of the Act neither of which addressed where a health and safety standard was to begin or to end. Section 3.8 recited that the standards were to be those "reasonably necessary or appropriate to provide safe or healthful employment." 29 U.S.C. § 652(8). Section 6(b)(5) required the Secretary of Labor to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity." 29 U.S.C. § 655(b)(5). Missing from either of these phrases was any indication of whether - or the extent to which - the standard was to address the economics of its imposition. It was clear that this omission was not mere inadvertence on the part of Congress because the excruciating examination of all of the Justices writing demonstrated that the subject of economics had been well-understood in the lawmaking process.

The rather sophisticated question at law in *Benzene* then was whether, and if so how, the courts (and the Executive Branch) were to insert considerations of economics into this pristine language that, to all political intents and purposes, had no motives other then health and welfare. The plurality decision affords us no guidance for the future; only the assurance that the Executive Branch, and necessarily the courts, would be called upon again to make these difficult legislative decisions.

Indeed, a year later this very statute and the same phrases were revisited by this Court in *Cotton Dust*. Now the Court was confronted with the need to interpret the word "feasible" to squeeze out of it at least a meaning that would enable a consideration of whether some semblance of the affected industry would survive. *Cotton Dust*, 452 U.S. at 508-511. And then the Court had to consider the further implications of whether economic address could include the

more esoteric consideration of a cost benefit analysis. There can be little doubt that the Court, being unelected, had been imposed upon to make the hard choices that Congress had refused directly to address. As he had in *Benzene*, Justice Rehnquist, now joined by Chief Justice Burger, dissented noting, *inter alia*:

> I am convinced that the reason that Congress did not speak with greater "clarity" was because it could not. The words "to the extent feasible" were used to mask a fundamental policy disagreement in Congress. I have no doubt that if Congress had been required to choose whether to mandate, permit or prohibit the Secretary from engaging in a cost-benefit analysis, there would have been no bill for the President to sign.

Cotton Dust, 452 U.S. at 546. To this one might add that "therefore, hereafter, these difficult political, social and economic decisions will have to be made by the coordinate branch most widely separated from the voting public."

C. The *Mistretta* Legacy

After these two decisions, there have been no significant statements from this Court on the subject of legislative delegation in the guise of execution with the exception of *Mistretta v. United States*, 488 U.S. 361 (1989). That case presented both legislation delegation issues and function delegation issues. As to the former, this Court found that there had been sufficient standards and principles enunciated to guide the Sentencing Commission and that there was therefore no unconstitutional delegation. *Mistretta*,

488 U.S. at 412. The dissent agreed that there were adequate principles and standards present in the law, but disagreed with the conclusion that there was therefore no unconstitutional delegation. This was because the degree of authority delegated was "excessive," thus creating a legislative substructure not intended by the Constitution. *Id.* at 419.

This cession of hard choices too hot to handle, is not within the comprehension of our Constitution. Noting a similar abandonment of an unpopular task by Congress, Justice Kennedy, concurring in *Clinton v. New York*, 524 U.S. 417, 451-52 (1998) (citations omitted), stated:

> It is no answer, of course, to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish. That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow... Abdication of responsibility is not part of the constitutional design.

The decisions in sum, including those that are interspersed with those just noted, provide little or no guidance for the consideration of the instant case. This is not the product of the lack of sharp lines between what manner or degree of delegation will or will not pass muster, so much as

a seeming acquiescence in the congressional process of leaving politically sensitive and complex issues to a coordinate body. In the instant case, we have the specter of the agency and the courts being called upon to decide - on no basis ever articulated by Congress - who shall live, who shall die, who shall be well and who shall not. We have a decision below that frames no instruction or guidance on the economics of the provision in question, although there is no doubt whatsoever that some must exist, lest we return to an agrarian society. Absent the intervention of this Court, the Article II and Article III branches will proceed to do the work of the Article I branch under a court-imposed structure that institutionalizes delegation of legislative functions.

II. CONTEMPORARY REGULATORY COMPLEXITIES DO NOT REQUIRE ABANDONMENT OF CONSTITUTIONAL REQUIREMENTS FOR ENACTMENT OF REASONABLY PRECISE STATUTORY PRINCIPLES AND STANDARDS

This case raises nondelegation issues which are more pervasive than seen in any prior case. Not only are more Americans affected by the outcome of this case than by any previously decided, but the impact on their lives extends far beyond that possible in any prior case of this kind considered by this Court. This is not a single product case, such as *Benzene*. This is not a single industry case such as *Cotton Dust* or *Schechter Poultry*. This is not a case in which the economic fate of a relatively small portion of our population might be negatively impacted. This is a case where all Americans are "users" and "breathers."

The question then may be whether, under such circumstances, a greater duty of explication is owed by Congress than if a narrow band of society is implicated and

one who's fate may be, in substantial measure, left to experts, bureaucrats and administrators. We submit that the answer is clearly in the affirmative. Thirty years ago, Congress had a duty to say more than that regulations should issue which are "requisite to protect" the "public health" and "welfare." 42 U.S.C. § 7409(b)(1)-(2). And if Congress then had no particularized information on which to base anything more definitive, it certainly can do better now. The intervening thirty years has produced a vast array of information on every conceivable subject relevant to decision-making under this statute; this much is made clear by the briefings and decision below and the briefing already presented to this Court.

In *Mistretta*, this Court stated that, in applying Justice Taft's "intelligible principle" test the Court's jurisprudence had been "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." 488 U.S. at 372 (citations omitted).

Unquestionably a society consisting of almost three hundred million people, in fifty states, two hundred years after the beginning of the industrial revolution, having the daily potential of breathing unhealthful air is not susceptible to a Legislative Branch functioning as a monolith, without a synergistic relationship with the Executive Branch.

But this Court did not find itself, somehow, bound because of the growth of our society. Continuing, the *Mistretta* Court quoted *Panama Refining* stating: "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Id.* (quoting *Panama Refining*, 293 U.S. at 421). Unquestionably, those "resources" include access not only to

those who petition their causes, but also the resources of the much larger and technically proficient Executive Branch.

There is simply no reason why legislation must proceed solely and singularly from the Legislative Branch with no advice and guidance from the Executive Branch that would enable reasonable specificity on such matters as the economics of the improvement of our ambient air. Knowing this plain truism, the *Mistretta* Court concluded on this subject: "Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Id.* at 372-73 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

And therefore we must consider just what is meant by "boundaries," and whether the statute at issue contains such boundaries. We submit that the boundaries circumscribing Executive Branch action must take into consideration the nature of the impact of the act itself. Logically, workplace control over a ubiquitous chemical such as benzene may inherently suggest a relatively low degree of boundary description by Congress before commitment into the hands of an agency expert in workplace oversight and having access to all manner of technical advice on risks. Even there, however, the boundaries need to account for the question of whether, and the extent to which, the economics of control are to be considered and the very notion of economic considerations is certainly capable of manifestation in the words of the statute itself.

But if the universe of that which is to be legislated takes on the dimension of the ambient air, and if the objective is to ensure "health and welfare," we must expect something more of Congress than the unbounded use of those terms. To

do no more, given that we are controlling the air and the health of our entire population, we would come close to Professor Scalia's suggestion that the abandonment of a nondelegation doctrine might suggest that "Congress could presumably vote all powers to the President and adjourn." Scalia, "A Note on the Benzene Case," *REG.*, July-Aug. 1980, at 28. "Boundaries" must have a meaning that - in fact - avoids the very issues that are before this Court.

Here, the Circuit had previously imposed an absolute ban on consideration of the economics of air quality. *Lead Industries*, 647 F.2d at 1148. It did so in the absence of any language - or even words so suggestive as "feasibility" in § 109 of the Act: "As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards." *American Trucking*, 175 F.3d at 1040 (citing *Lead Industries*, 647 F.2d at 1148).

"Why," one might ask? The answer seems to lie in the profound silence of Congress. Notwithstanding the arguments made to this Court in the First Round briefing, the reality is that Congress, with plain intent to avoid any implication that it was trading dollars for lives, simply stood mute, unquestionably knowing that the very controversy before this Court would play out over the succeeding years. *See, e.g.*, *Benzene*, 448 U.S. at 672 (Rehnquist, J., concurring); *Cotton Dust*, 452 U.S. at 543 (Rehnquist, J., dissenting); Scalia, "Legislative Veto," at 24. And does this mean that our nation will be deindustrialized and return - at least - to Mr. Jefferson's agrarian society? The answer was left for decision, presumably, to EPA, an Executive Branch agency not even enjoying an official seat in the President's Cabinet.

Imperative also within the certain contemplation of the Congress was the fact that this legislation by omission would implicate the Article III branch as the ultimate arbiter of what Congress might have meant to do. And, indeed, the economics of clean air is now before this Court which presumably must decide whether and how to balance life against cost. In this connection, and not illogically, some of the briefs before this Court suggest that, notwithstanding the admonitions in *Lead Industries*, EPA has regularly engaged in what can be described as "closet economics" to avoid the thorough illogic of considering such regulations with deindustrialization as a required objective. *See, e.g.*, Brief for Cross-Petitioners at 43, *et seq.*

In the instant case, the D.C. Circuit then proceeded to build on what else was missing: "The principle EPA invokes for each increment in stringency ... that it is 'possible, but not certain' that health effects exist at that level ... could as easily, for any nonthreshold pollutant, justify a standard of zero." *American Trucking*, 175 F.3d at 1036. And, for contrast, the Court noted that, at the other pole, EPA might just as easily "justify a refusal to reduce levels below those associated with London's 'Killer Fog' of 1952." *Id.* The remark was apt because, not only were there no boundaries even suggested for the economics of air quality, there were, more importantly, none suggested for the air itself. This meant that Congress had given EPA no political, social, or economic boundaries from which it could make any judgments. At this point the issue becomes quite clear: May Congress legislate with no greater specification of "boundaries" or "intelligible principles" the simple commandment to the Executive Branch that the air shall be made clean?

Is this all we should expect from Congress where so much is at stake? There has not - yet - been an evolution of

guidance from this Court which would conclusively answer this question. But it is very plain that Congress could have done precisely what the Circuit was required to do and what this Court is being asked to do - and with no fewer or poorer tools. The "Petitions" to this Court and the court below were petitions that should have gone to Congress. It is Congress, and not the courts, that should have made these terribly difficult decisions.

III. NONDELEGATION IS NOT SUBSUMED BY *CHEVRON*

Despite the D.C. Circuit's reliance upon *International Union, UAW v. OSHA* ("*Lockout/Tagout I*"), 938 F.2d 1310, 1313 (D.C. Cir. 1991), it is not entirely clear just why the court thought to send back to an Executive Branch agency a statute which it had found contained no "intelligible principle" let alone any "boundaries." The Circuit noted in its decision and again on rehearing:

> Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own.

American Trucking, 175 F.3d at 1038 (citing *Lockout/Tagout I*, 938 F.2d at 1313); *American Trucking Rehearing*, 195 F.3d at 7 (citing *American Trucking*, 175 F.3d at 1038). The Circuit justified this approach stating:

> Accordingly, just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority.

American Trucking Rehearing, 195 F.3d at 8. Adding: "In sum, the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*." *Id.* (citing *Benzene*, 448 U.S. at 642, 646 (Stevens, J., plurality) (interpreting § 3(8) of the Occupational Health and Safety Act to require "a threshold finding ... that significant risks are present," thereby finding the statute an intelligible principle).

We do not fathom how this transition from the nondelegation doctrine was made notwithstanding the explanation given. We can find no premise for this transition in *Benzene* itself; there is nothing therein to indicate that this Court was ready to abdicate an approach to separation of powers that has at least a 150-year vintage. Although some commentators have suggested that this may be a more practical approach, it is hardly one that has been even facially adopted by this Court.

Further, it is not particularly logical to commonalize the notion of an ambiguous meaning with the absence of any meaning at all. It is true that where there is at least a thread of an intent of Congress in words or phrases of a statute which may be tracked back to the legislative history or the setting of the lawmaking, the courts may, and probably

should, attempt to see if the thread leads to a result of substance.[7] But those circumstances do not represent the facts in this case, as is amply demonstrated by the remarkably attenuated attempts by all parties to attach essentially non-existent substance and vague analogies to the health and welfare language of § 109. In at least one particular context, it is most unlikely that the Circuit itself considered that a further search for reason would yield any new results. This, of course, has to do with the question of whether the economics of new standards were for consideration by EPA. That concept, as previously noted, had been rejected by the Circuit some twenty years earlier and, without exception, reinforced against every onslaught thereafter, including in the instant case. *American Trucking*, 175 F.3d at 1040; *Lead Industries*, 647 F.2d at 1148. In fact, it has been the conclusion of the Circuit that the provision is NOT ambiguous in this regard and that it clearly precludes consideration of the economics of compliance, at least under § 109. *American Trucking, supra*, at 1040.

Nor is it conceptually unreasonable for the Circuit to give the agency the opportunity to clarify its conclusions against the meaning of the statute in other regards, such as enunciating the point along the continuum of clean to dirty at which Congress intended the agency to light. But, as the Circuit itself noted, neither the original EPA documentation, nor the briefings twice over, nor the arguments made in the

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7 In *International Union v. OSHA*, 37 F.3d 665 (1994), it took five years and two trips to the circuit for the agency to find sufficient threads to overcome a nondelegation determination; and at that, it was plainly a close call and required maximum "fudging" on whether intelligible principles permitted a cost-benefit analysis.

case (presumably, either by the agency or the petitioners or any *amici*) had accomplished that task. The Circuit noted after rehearing:

> Indeed, the EPA's briefs in each of these two cases contained the same four sentences assuring the court that the statute provides a principle without explaining what the agency understands that principle to be.
>
> * * *
>
> These sentences begged the key question about that intelligible principle: "What is it?"

American Trucking Rehearing, 195 F.3d at 7. And the case, as it arrives before this Court, has no better elucidation. There must be a time when the possibility of an ambiguity that can be clarified must give way to the greater likelihood that what is missing truly is simply not there. While no one would go so far as to suggest the imposition of the rule of *contra proferentum* against Congress, in the present factual setting, as we have previously noted, much more must be expected of the lawmaking body.

The application of *Chevron* to emasculate nondelegation is not an attractive approach to consideration of constitutionality of laws for another reason. That reason has to do with the disciplines which we are entitled to expect of the lawmaking body. We have noted the increasing commentary of the courts, including this one, and other writers in the field, to the effect that Congress is passing its too-hot-to-handle issues to its coordinate branches. *See, e.g., Benzene*, 448 U.S. at 672 (Rehnquist, J., concurring); *Cotton*

Dust, 452 U.S. at 543 (Rehnquist, J., dissenting); Scalia, "Legislative Veto," at 24. If the guise of ambiguity and the application of *Chevron II* is allowed to trench this practice, what we have seen in this case, in *Benzene* and in others such as *Cotton Dust* will surely become an established practice of overwriting intentional political omissions in difficult legislation.

That just this problem is already emerging is suggested by the fact that even though *Chevron* was decided in 1984, there have been at least 45 D.C. Circuit cases requiring *Chevron II* examination since 1992. *See, e.g., First American Discount Corp. v. Commodity Futures Trading Comm'n*, No. 99-1098, 2000 WL 1099978, at *4 (D.C. Cir. Aug. 18, 2000) (most recent case to require *Chevron II* examination); *Society of Plastics Indus., Inc. v. ICC*, 955 F.2d 722, 727-729 (D.C. Cir. 1992) (first case in 1992 to require *Chevron II* examination).

As recently as July of this year, the same Circuit again had to visit the Clean Air Act under the *Chevron II* doctrine, in that case § 112(i)(3) to figure out, against a silent statute, whether requirements for expediting compliance could be imposed. *Chemical Mfrs. Ass'n v. EPA*, 217 F.3d 861 (D.C. Cir. 2000).

IV. THE OVERTURNING OF § 109 OF THE CLEAN AIR ACT WOULD NOT DISRUPT THE NATION'S EFFORTS TO REGULATE AIR POLLUTION

These *amici* have no interest in disrupting, delaying or otherwise making even more difficult the implementation and management of this complex and very important statute. They DO have a profound interest in knowing that they will be required to comply with an empowering law and rationally

law-based regulations that reflect the will of Congress. They have a further interest in knowing that their rights and opportunities of petition to that elected body will be requited by actual language in the law that sets forth intelligible principles, standards, and boundaries to guide EPA. We believe this provision of the law must be returned to its maker for such standards, principles and boundaries that enable implementation considering where, in the continuum of clean air they are to be and how the economics of compliance are to be addressed.

It is our further view that this Court is well able to fashion a means for this purpose which will impose no hardship on the American public. This Court can, of course, stay its judgment to enable remedial legislation. *See, Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 88-89 (1982). And Congress certainly would not be writing on a clean slate devoid of criteria to guide its consideration. As we have previously noted, the Circuit decision and the very extensive briefings to this Court demonstrate that the universe of considerations is well-articulated already. Petition of these considerations should be before the Article I Branch on issues so fundamental and should not, in the first instance, be relegated to a regulatory agency.

CONCLUSION

The decision of the Court of Appeals should be reversed. This Court should hold that the nondelegation principles of the Constitution have been violated by the absence from § 109 of intelligible principles, standards, and boundaries by which EPA may reasonably effectuate a regulatory process and that the provision is therefore unconstitutional.

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Respectfully submitted,

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